

Memorandum

To : Dennis W. Westcott
RWQCB, Central Valley Region

Date: MAR - 3 1994

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From : OFFICE OF THE CHIEF COUNSEL
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Subject: APPLICATION OF THE TRIBUTARY FOOTNOTE IN THE WATER QUALITY
CONTROL PLAN FOR THE RWQCB, CENTRAL VALLEY REGION, BASINS 5A,
5B, AND 5C

ISSUE

How should the RWQCB apply the tributary footnote which appears in its Water Quality Control Plan for Basins 5A, 5B, and 5C (Basin Plan)?

CONCLUSION

The tributary footnote provides that, where watercourses have been designated to have specified beneficial uses, tributaries to such watercourses shall have the same beneficial uses. Watercourses include streams and do not include constructed agricultural drains. Where the RWQCB seeks to replace the "de facto" designation in the tributary footnote with a specific designation for the tributary in the Basin Plan, the RWQCB may perform a survey and assessment of all past, present, and probable future beneficial uses, and amend the Basin Plan to insert the appropriate beneficial uses.

DISCUSSION

The California Water Code (Water Code) and the federal Clean Water Act (CWA) both have provisions requiring the RWQCB to develop beneficial use designations for surface waters throughout the region. Water Code Section 13240 requires the RWQCB to adopt Basin Plans. Basin Plans consist of beneficial use designation, water quality objectives and programs of

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implementation. Water Code Section 13050(j). Water Code Section 13241 requires the establishment of water quality objectives in water quality control plans which will "ensure the reasonable protection of beneficial uses". In establishing water quality objectives, the RWQCB must consider "[p]ast, present, and probable future beneficial uses of water". Water Code Section 13241(a). CWA Section 303 requires states to adopt water quality standards for all surface waters. Adoption of these standards includes "designating the uses to be made of the water". 40 Code of Federal Regulations (CFR) Section 131.2. Designated uses are defined as "those uses specified in water quality standards for each water body or segment whether or not they are being obtained". 40 CFR Section 131.3(f).

In many of the water quality control plans adopted by RWQCBs, the plans do not specifically identify all tributaries and designate beneficial uses for them. Instead, the plans contain a statement that the beneficial uses of listed waterbodies also apply to their unnamed tributaries. The Basin Plan for 5A, 5B, and 5C has a footnote which accomplishes this purpose. The footnote states: "Those streams not listed have the same beneficial uses as the streams, lakes and reservoirs to which they are tributary." (Basin Plan, Table II-1, footnote (1).) This footnote is limited to "streams", and there is no indication that the Basin Plan should be read to include other tributaries, such as constructed agricultural drains. Thus, the footnote should be used to identify beneficial uses for tributary streams which are not specifically designated in the Basin Plan.

One other consideration in determining beneficial uses for tributaries is the SWRCB's "Sources of Drinking Water Policy", Resolution No. 88-63, which has been incorporated into the Basin Plan. (See, Basin Plan, at page IV-7.) This policy acts to designate MUN as a beneficial use for all waterbodies for which beneficial uses have not been designated. Thus, tributaries, excepting constructed agricultural drains, and certain other collection and treatment systems which are described in the Policy, will have the MUN designation unless they have otherwise assigned beneficial uses.

Should the RWQCB decide to establish specific beneficial use designations for a stream tributary, instead of relying on the tributary footnote and the Sources of Drinking Water Policy, it must adopt a Basin Plan amendment. This procedure is required by Water Code Sections 13240, 13241, and 13050(j), which require the establishment of water quality objectives and beneficial uses in water quality control plans.

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In establishing specific uses for surface waters, which will then become part of water quality standards under the CWA, the RWQCB must comply with 40 CFR Section 131.10. Generally, this regulation provides that states may remove a designated use which is not an existing use¹ if the state can demonstrate that attainment is not feasible, and that states may not remove designated uses if either they are existing uses, or they are attainable. (40 CFR Section 131.10(g) and (h).) The state must conduct a use attainability analysis (UAA) whenever the state designates uses that do not include those specified in CWA Section 101(a)(2),² or the state removes a designated use listed in Section 101(a)(2). (40 CFR Section 131.10(j).) A UAA is not required where the designated uses include those specified in CWA Section 101(a)(2). (40 CFR Section 131.10(k).)

The process which you have described to me, of conducting a survey and assessment for specific designation of beneficial uses of stream tributaries which are currently subject to the tributary footnote, should be adequate to meet the requirements in the Water Code and the federal law and regulations for adoption of water quality objectives and water quality standards. After conducting the survey and assessment, the Basin Plan would be amended. You have stated that the survey and assessment would be "equivalent" to a UAA. If the conditions described in 40 CFR Section 131.10(j) are present, the EPA regulations require a UAA. I suggest you work with EPA to receive advance agreement on the documentation which will be required.

The designation of beneficial uses in constructed agricultural drains is not covered by either the tributary footnote or the Sources of Drinking Water Policy. Thus, beneficial uses of these waterbodies have not been designated in the Basin Plan. Some constructed agricultural drains may be waters of the United States and may have some beneficial uses. However, at this time these have not been designated. Should the RWQCB choose to designate these uses in the future, the provisions in the Water Code, and the federal statute and regulations must be followed.

¹ "Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." 40 CFR Section 131.3(e).

² These uses are protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water.